

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
25 Market Street
Trenton, New Jersey 08625-0112
Attorney for Defendants John Fallick and Nicholas Mueller

By: Marvin L. Freeman
Deputy Attorney General
Attorney Id#045441995
(609) 376-2998
marvin.freeman@law.njoag.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF CAMDEN

THE ESTATE OF JIMMY LEE TESTA,
and DEBRA L. STEVENS,
ADMINISTRATOR AD
PROSEQUENDUM in her own right

Plaintiffs,

v.

JOHN FALLICK, NICHOLAS
MUELLER, JOHN DOES 1-10, ABC
ENTITIES A-Z

Defendants.

Hon. Karen M. Williams, U.S.D.J.
Hon. Sharon A. King, U.S.M.J.

Civil Action No. 18-cv-15257

**DEFENDANTS' STATEMENT OF MATERIAL FACTS PURSUANT TO
LOCAL L.Civ.R. 56.1**

1. On November 6, 2016, Defendants, New Jersey State Troopers John Fallick and Nicholas Mueller, were dispatched to investigate a 9-1-1 report of a suspicious person/burglary in progress at an abandoned house in Leesburg, Maurice River Township, Cumberland County. (Exhibit-G, p.1)

2. Alfred Tozer, who called 9-1-1 met with Fallick and pointed out the location of two abandoned houses, one of which he had seen a suspicious person. (Exhibit-B, p.17)

3. It was dark and the only available lights were Fallick's and Mueller's spotlights and flashlights. *Id.* at pp.19:23-24:2.

4. Fallick went around to the back of the abandoned house located at 147 High Street, Leesburg, while Mueller watched the front. Fallick heard a sound on the second floor and Mueller shined his flashlight toward the direction of the sound to point out its location. Using his flashlight, Fallick saw someone, (now identified as Jimmy Lee Testa), sitting in the window. He immediately identified himself as "State Police" and ordered Testa to come down. *Id.* at pp. 18:17-18; 22:1-13.

5. Testa responded, "I can't and refused to come out of the house as Fallick had directed him to do. *Id.* at p.22:1-13).

6. Fallick called out to Testa again, identifying himself as State Police and ordered him to come down now, but Testa again stated, "I can't." When Mueller heard Fallick yelling, he came around back, but Fallick told him to go back to the

front in the event Testa tried to escape from that direction. They called for backup. *Id.* at pp.23:20-24:6; 27:17-28:9.

7. Using his flashlight, Fallick saw the top of Testa's head in the window and ordered him again to "come out, State Police, come outside, get out here," but Testa responded "I can't," but when Testa started fiddling with the door handle, Fallick drew his service weapon and kicked the door in. *Id.* at p.27:7-19.

8. After kicking the door in and with his weapon drawn, Fallick saw Testa and ordered him to come out of the house and get on the ground because he was under arrest, but Testa did not comply and charged into Fallick. *Id.* at p.29:18-19.

9. Fallick and Mueller engaged Testa in a foot pursuit in and around the backyard of the abandoned house at 147 High Street, and ordered him to stop running and get on the ground because he was under arrest. *Id.* at p.30:18.

10. Testa was suspected of committing burglary. (Exhibit-D, p.21:9-11).

11. While being chased in and around the back yard of the abandoned house and 147 High Street, Testa did not comply with Fallick's instructions to stop running and get on the ground. (Exhibit-B, pp.30:19-33:6).

12. Fallick and Mueller tackled Testa to the ground in the back yard of the abandoned house at 147 High Street. *Id.* at p.32:21-25.

13. Fallick and Mueller struggled with Testa on the ground at 147 High Street, trying to handcuff him to place him under arrest, but Testa refused to comply. *Id.* at 35:10-14.

14. Based on Fallick's assessment, Testa was surprisingly strong. *Id.* at p.36:16.

15. Testa started pushing Fallick and Mueller off, as they tried to grab his arms. *Id.* at p.35:21-23.

16. While he struggled with Testa, Fallick was trying to holster his gun, but he could not because he did not realize that the flap that secured his gun was in the upward position. *Id.* at p.37:8-14.

17. Testa broke free and ran around the backyard of the abandoned house at 147 High Street and then Testa ran out of the backyard of 147 High Street, across the road into the backyard of a residence located at 138 High Street. *Id.* at pp.37:10-14; 40:15-41:25; (Exhibit-D, p.6:15-22).

18. Fallick and Mueller pursued Testa on foot across the street into the backyard of a house located at 138 High Street and as they did, Fallick looked down and noticed the hood on his holster was up, so he reached to put it down and secured his gun. (Exhibit-B, pp.40:9-42:16).

19. Fallick tripped and fell in a hole or over an obstacle, as he pursued Testa on foot from 147 High Street into the backyard of 138 High Street *Id.* at pp.40:22–42:2).

20. Mueller was one step behind Testa and tackled him to the ground in the backyard of 138 High Street next to a shed and a pile of junk, and Fallick came to assist. *Id.* at p.42:4-16.

21. The backyard of 138 High Street where the second struggle occurred was littered with old lawnmowers, air conditioners, piles of aluminum cans, wagons, gutters, poles, an old vehicle and a number of assorted scrap metal items. (Exhibit-H, p.035).

22. As Fallick and Mueller tried to handcuff Testa and get him under control, he was flailing around violently, kicking his feet and throwing his arms around, attempting to get away. (Exhibit-B, p.44:9-14).

23. Mueller told Testa to stop resisting and to put his hands behind his back, but Testa refused. (Exhibit-E, p.299).

24. Fallick deployed pepper spray to Testa's face, to get him to stop resisting and comply with their instructions, and Mueller was accidentally hit with an overspray, causing him to begin coughing. (Exhibit-B, at p.45:2-8).

25. The pepper spray had no effect on Testa and he continued to fight, push off and wrestle with Fallick and Mueller. *Id.* at p.46:10-16.

26. Fallick and Mueller used compliance strikes with their fists and elbows, to get Testa to comply, but their strikes did nothing and Testa kept struggling and trying to get up. (Exhibit-D, p.25:2-11).

27. Fallick told Testa to stop resisting and give up his hands, but Testa refused to comply. (Exhibit-B, p.49:4).

28. Fallick delivered combative strikes to Testa's abdominal area and to his side, trying to get him to comply, but he did not. *Id.*

29. Fallick punched Testa in the face and head with his fists several times to get him to comply with their instructions to stop resisting arrest. *Id.* at 42:22-43:6.

30. Testa was able to push off the ground and get up, but Fallick and Mueller struggled to force him back to the ground. (Exhibit-E, p.299).

31. Fallick grabbed Testa from behind and placed him in a headlock, trying to gain control of his head. (Exhibit-B, p.46:17-20).

32. Fallick held Testa as hard as he could against his neck, but Testa was still flailing around frantically and trying to get up and push away for them. *Id.* at p.46:17-47:12.

33. As Fallick was attempting to gain control of Testa using the headlock, Testa sat up in an upright position and leaned forward, which caused Fallick to lose his grip of the headlock. *Id.* at p.48:2-43:2.

34. Fallick had lost his primary state police issued flashlight during the struggle. *Id.* at p.62:12-19.

35. Fallick struck Testa several times in the head with a second flashlight he carried and Mueller also used his flashlight, trying to get Testa to comply and stop resisting, but Testa continued struggling, trying to push off and get up. *Id.* at p.56:1-9; (Exhibit-D, pp.25:23 – p.26:8).

36. At some point during the altercation, Testa landed on a pipe that was on the ground beneath him. (Exhibit-B, p.49:16-23).

37. Fallick was exhausted and had done all he could to stop Testa, but Testa kept fighting. (Exhibit-C, p.335).

38. Mueller believed they were losing the struggle with Testa. (Exhibit-D, p.9:6-14).

39. A steel pipe was underneath Testa and he started getting up while holding it. (Exhibit-D, p.14:3-10).

40. From his position, Fallick could see a steel galvanized pipe lying beneath Testa. (Exhibit-C, p.335).

41. From his position, Fallick could see the pipe moving and Testa pulling it up off the ground. *Id.* at p.335.

42. From his position, Mueller saw Testa gripping the pipe with his right hand. (Exhibit-D, p.8:25–9:8).

43. Mueller believed they were losing the fight and was fearful Testa would be able to get up with the pipe. *Id.* at p.9:9-23.

44. As Testa was grabbing the metal pipe, Mueller told Fallick, “He’s grabbing a metal pipe; he’s grabbing a metal pipe.” (Exhibit-E, p.318).

45. Mueller was pushing on the back of Testa’s arm, trying to keep the hand gripping the pipe down towards the ground. *Id.*

46. Testa was on all fours on his knees pushing up, while Fallick was on his left side and Mueller was on the right. (Exhibit-B, p.49:25-50:7).

47. Fallick was scared for his life and felt he was going to die, if Testa got up with the pipe. *Id.* at p.50:1-7.

48. Fallick yelled to Mueller to shoot because he thought Testa was going to kill them. *Id.* at pp.50:8-9; 51:9-13.

49. Mueller also was fearful for his life. (Exhibit-D, p.9:9-23).

50. Mueller told Testa if he did not stop right now, he would be shot. *Id.* at p.11:2-9.

51. Mueller could not draw his weapon because during the altercation, his duty belt and uniform were in disarray. *Id.* at p.9:15-23).

52. As Fallick and Mueller continued struggling, Testa engaged in an upward push with the pipe in his hand, and Fallick drew his service weapon. (Exhibit-B, p.52:3-5).

53. When Fallick drew his service weapon, he was behind Testa laying on top of his back. *Id.* at p.53:4-9.

54. Fallick was holding Testa's left arm and drew his weapon with his right hand. *Id.* at p.53:14-18.

55. Fallick fired once at close range from the hip retention position. *Id.* at p.53:22–54:7.

56. When Fallick fired his weapon, Testa fell flat on his stomach. *Id.* at p.54:8-10.

57. Fallick and Mueller handcuffed Testa because he was under arrest and tried to render as much aid as possible before emergency medical services arrived. *Id.* at 54:11-15.

58. On 11/06/2016 at 00:34:03, it was reported over State Police radio that the subject was running. (Exhibit-G, p.172)

59. On 11/06/2016 at 00:37:09, it was reported over State Police radio that shots had been fired. (Exhibit-E, *Id.*

60. On 11/06/2016 at 00:40:10, it was reported over the State Police radio that EMS and medic were en route. *Id.*

61. Testa suffered a gunshot wound on the right side of the back that exited at the right lower neck. (Exhibit-H, p.036).

62. Testa was pronounced deceased at the scene. (Exhibit-G, p.172).

63. Investigators from the Attorney General Shooting Incident Response Team (“SIRT”) found Mueller’s expandable baton in the rear yard of 147 High Street, where the first struggle occurred. (Exhibit-H, p.034).

64. Investigators found Fallick’s State Police flashlight at 147 High Street, where the first struggle occurred. *Id.*

65. Investigators observed a large metal pole near the feet of Testa’s body that measured five feet in length. *Id.* at p.035.

66. Investigators found two recording mic boxes that had been attached to Fallick and Mueller’s uniforms on the ground at 138 High Street, where the second struggle occurred. *Id.* at p.035.

67. Investigators found one spent cartridge casing on the ground under Testa’s body and ballistics test determined it was fired by Fallick’s gun. *Id.* at p.035, 141.

68. Investigators recovered a gray bag with multiple tools and one black garbage bag at 149 High Street, the abandoned house next to 147 High Street. *Id.* at p.036.

69. Testa’s autopsy report reflected positive for opiates, but his drug screen was negative. head trauma consisting of semi lunar lacerations, but the skull was not fractured. (Exhibit-I, p.183).

70. Besides Testa, who is now deceased, Fallick and Mueller were the only two individuals present at the scene when the shooting occurred. (Exhibits F and H generally).

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: s/Marvin L. Freeman
Marvin L. Freeman
Deputy Attorney General

Dated: August 19, 2022